2002

The State of Utah v. Konai Bloomfield : Brief of Appellant

Utah Court of Appeals

Mark L. Shurtleff; attorney general; J. Frederick Voros; assistant attorney general; attorney for appellee.
Ronald J. Yengich, Vanessa Ramos-Smith; Yengich, Rich and Xaiz; attorneys for appellant.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. KONAI BLOOMFIELD, Defendant/Appellant.	)))))))))	APPELLANT'S OPENING BRIEF Case No. 20020249 CA Priority No. 2

APPEAL FROM THE JUDGMENT AND CONVICTION FOR TWO COUNTS OF AGGRAVATED ROBBERY, A FIRST DEGREE FELONY, IN VIOLATION OF UTAH CODE ANNOTATED UTAH CODE ANN. § 76-6-302 (2001), IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE COUNTY, STATE OF UTAH, THE HONORABLE HOMER F. WILKINSON, JUDGE PRESIDING

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ORAL ARGUMENT REQUESTED

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LIST OF PARTIES IN THE COURT BELOW

The following is a complete list of the parties in the proceedings before the Third Judicial District Court:

JUDGE

The Honorable Homer F. Wilkinson, Judge Presiding;

PARTIES

State of Utah, represented by Mark Kouris, Assistant Salt Lake District Attorney;

Konai Bloomfield, defendant, represented by Douglas Weaver, Attorney at Law, at trial.

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STATEMENT OF JURISDICTION

This is an appeal from a judgment and conviction of Konai Bloomfield ("Appellant") for two counts of Aggravated Robbery, a First Degree Felony, in violation of UTAH CODE ANN. § 76-6-302 (2001). *See* Addendum I.

This Court obtains jurisdiction to hear this appeal of a criminal case pursuant to a transfer from the Utah Supreme Court, under UTAH CODE ANN. § 78-2-2(4).

ISSUES PRESENTED AND STANDARD OF REVIEW

I. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO CONVICT APPELLANT OF AGGRAVATED ROBBERY IN COUNT I, AS IT RELATED TO THE ALLEGED VICTIM, JOSE FARIAS

In a jury trial, the jury serves as the exclusive judge of both the credibility of witnesses and the weight to be given particular evidence. This court reverses a jury verdict only if, after viewing all the evidence and inferences therefrom in the light most favorable to that verdict, it finds the evidence "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *State v.* Baker, 963 P.2d 801 (Utah Ct. App. 1998), *citing State v. Span*, 819 P.2d 329, 332 (Utah 1991)(other citations omitted).

II. THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO CONVICT APPELLANT OF AGGRAVATED ROBBERY IN COUNT II, AS IT RELATED TO THE ALLEGED VICTIM, GABRIEL CALVILLO

In a jury trial, the jury serves as the exclusive judge of both the credibility of witnesses and the weight to be given particular evidence. This court reverses a jury verdict only if, after viewing all the evidence and inferences therefrom in the light most favorable to that verdict, it finds the evidence "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed

the crime of which he was convicted." *State v.* Baker, 963 P.2d 801 (Utah Ct. App. 1998), *citing State v. Span*, 819 P.2d 329, 332 (Utah 1991)(other citations omitted).

III. THE TRIAL COURT COMMITTED PLAIN ERROR IN ADMITTING THE VIDEO TAPE OF THE INCIDENT ABSENT PROPER FOUNDATION

Because Appellant's trial counsel did not object to the introduction of the video tape, this Court may still consider such argument under the plain error analysis or to avoid manifest injustice. *See State v. Saunders*, 1999 UT 59, ¶ 30, 992 P.2d 951, 961 (Utah 1999); *State v. Rudolph*, 970 P.2d 1221 (Utah 1998)[1]. In order to demonstrate plain error, defendant must show: 1) error, 2) that the error should have been obvious to the trial court, and 3) that the error was harmful. *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993).

IV. APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHICH PREJUDICED HIS RIGHTS UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION

A. Standard of Review

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[1] *See also Gov't of Virgin Islands v. Smith*, 949 F.2d 677 (3rd Cir. 1991)(holding that in the absence of objection at trial relative to instructing the jury on the State's burden of disproving self-defense, such error was sufficiently obvious to permit the court on appeal to consider it); *State v. McCullum*, 656 P.2d 1064 (Wash. 1983)(holding that defense counsel's failure to offer burden of proof instruction regarding self-defense, nor his objection to this lack of instruction was still an issue entitled to be reviewed on appeal).

To prevail on an ineffectiveness claim, a defendant must show: "(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant." *State v. Classon*, 935 P.2d 524 (Utah Ct. App. 1997), *citing Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The following relevant constitutional provisions, statutes and rules are referred to in Appellant's Brief and are reproduced at Addendum II: Fifth Amendment and Sixth Amendment of the United States Constitution, Article 1, section 12 of the Utah Constitution, Rule 901 of the Utah Rules of Evidence, Utah Code Annotated § 76-1-601, § 76-2-202, § 76-6-301, § 76-6-302, and § 78-2-2(4).

STATEMENT OF THE CASE

A. Nature of the Case

An Information filed on or about March 14, 2000, charged Appellant with two counts of Aggravated Robbery, a first degree felony (R. 002).

B. Course of Proceedings

Appellant proceeded to trial by jury before the Honorable Homer F. Wilkinson, on August 14, 2000 (R. 98).

C. Disposition in Trial Court

Appellant was found guilty of two counts of Aggravated Robbery on August 14, 2000 (R. 51-52)[2]. Appellant was sentenced on November 9, 2000, to five years to life in prison on each count, to run concurrently (R. 82-83). A Notice of Appeal was signed December 7, 2000, and untimely filed December 12, 2000. (R. 89). After full briefing in this Court, the Court *sua sponte* dismissed the appeal for lack of jurisdiction based upon the untimely filing of the Notice of Appeal. Appellant then filed a petition for post-conviction relief, which was granted (R. 99). Appellant was re-sentenced *nunc pro tunc* on March 15, 2002 (R.118) and a Notice of Appeal was again filed, in a timely manner on March 19, 2002. (R.120).

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[2] Counsel on appeal did not represent Appellant during the proceedings held in the trial court.

D. Statement of the Facts

The incident for which Appellant was convicted involved an assault which took place in a restaurant called Betos. There were five individuals involved in the assault; Appellant, George Afu, ("George") and "Joe" (LNU), who all arrived together, and two victims, Jose Farias ("Farias") and Gabriel Calvillo ("Calvillo"). Farias did not testify at trial. Officer Jason Huggard ("Huggard") had responded to a silent alarm at Betos on the night of February 26, 2000 (R.98, p.53). There was a video of the incident recorded from security cameras in the restaurant (Exhibit 1) (R.98, p.60).

The State admitted the video through testimony of Huggard who stated that it appeared to be the video from that night. He identified the different cameras in the restaurant and testified that blood observed in the video was consistent with where it was actually discovered in the restaurant (R.98, p.63,67). The video was admitted without objection (R.98, p.67). From viewing the video, Appellant enters the restaurant at approximately 2:23:30. *See* Exhibit 1. There is conversation between Appellant's group and the individuals seated in the restaurant from approximately 2:23:40 to 2:24:05. *Id.* Appellant is standing at the counter until approximately 2:25:00. *Id.* Rachel Redding ("Redding") was present with the two victims while at the restaurant. Redding and Farias refilled their drinks at 2:25:26. *Id.* The video depicts Appellant swinging and attempting to hit Farias at 2:26:00.

Id. Farias fell on the counter top at 2:26:03, and a fight ensued. Appellant pulled out Farias' eyebrow ring at 2:26:23. *Id.* At the same time, a separate fight was taking place with Calvillo and Joe (the other person from Appellant's group). After the fight, George looked through Calvillo's pockets as they left, and Appellant appeared to be standing over Calvillo, watching George at 2:26:52. *Id.*

When Huggard arrived on the scene, Farias was on the floor unconscious and Calvillo was seated in a booth holding his face (R.98, p.55). Huggard testified that Farias had numerous bruises, scrapes and contusions on his head and that those were the only injuries he observed (R.98, p.55). Exhibits 3 and 4 were introduced to depict Farias on the evening in question (R.98, p.61). From the video, Appellant was identified as the second person of the group of three who entered the restaurant (R.98, p.64).

Redding testified that both Farias and Calvillo had been drinking earlier in the evening (R.98, p.72). Farias was fairly drunk that evening (R.98, p.88). Farias had an eyebrow ring and a tongue ring (R.98, p.72). When Appellant and the two other individuals entered the restaurant, there were initial discussions with Farias and Calvillo (R.98, p.75). One individual from Appellant's group shook hands with Farias and everything was okay when they parted company. *Id.* Redding volunteered to get Farias a refill on his drink and approached the counter with Farias (R.98, p.76-78). Redding saw Farias fall on the counter

after being hit by Appellant and also saw Calvillo getting hit in the face (R.98, p.78-79). Redding also testified that Appellant pulled out Farias' eyebrow ring and that someone went through his pockets (R.98, p.80-81). Appellant, George and Joe left the restaurant, and Redding tried to call the police (R.98, p.83-84). Redding stated that she could only recall one person going through Farias' pockets (R.98, p.89). The video indicates that George -- not Appellant -- appears to be going through Farias' pockets (Exh. I, at approx. 2:26:15). Huggard also testified that it did not appear that Appellant took anything from Farias' or Calvillo's pockets (R.98, p.70).

Calvillo testified that Appellant and two others came into the restaurant and they said hello. Calvillo did not know any of them (R.98, p.97). Appellant, George and Joe were ordering at the counter, and Farias and Redding approached the register (R.98, p.98). One of the individuals came behind Calvillo and then he lost consciousness *Id.* Calvillo stated that Appellant was not the one who came up behind him (R.98, p.106). Calvillo had a bridge which was knocked out, but had no permanent damage (R.98, p.99-100). He also received a broken nose and required some stitches (R.98, p.99-101). Calvillo's wallet was taken from his back pocket, which contained some money. Calvillo testified that he did not have any weapons (R.98, p.105).

The state rested and Appellant then testified in his own behalf (R.98, p.108). Appellant and his friend George and other person named Joe went to Betos to get something to eat (R.98, p.110). Appellant noticed Farias staring at them and giving them dirty looks as if they didn't belong there (R.98, p.111-12). Appellant asked Farias what his problem was and Farias made a motion as if he was going for a gun (R.98, p.112). Appellant then walked to the counter to order food. He noticed Farias standing on his blind side, and Appellant believed he was about to be assaulted (R.98, p.113). Appellant had been blinded in his right eye, so when Farias approached, Appellant thought he was going to attack him, so he turned and threw a punch at Farias (R.98, p.114-15). Appellant and George both hit and kicked Farias (R.98, p.116). Appellant pulled out Farias' eyebrow ring and threw it at him (R.98, p.126). After Appellant left Farias, Joe asked if Farias had a weapon. Appellant responded that he did not after he went back over to Farias and patted him down (R.98, p.126). Appellant then left with George and Joe. Appellant never took any property from anyone and never touched Calvillo (R.98, p.117). Appellant did not see Joe leave his side to hit Calvillo when they first were ordering food at the counter (R. 98, p.123). When all three left in the car after the incident, Appellant saw Joe throw a wallet out the window (R.98, p.120).

SUMMARY OF ARGUMENT

Appellant submits that there was insufficient evidence presented to warrant his conviction for Aggravated Robbery as it relates to both Farias and Calvillo. As it relates to Farias, there was no evidence of a taking, given that the eyebrow ring that was removed was left with Farias, therefore there was no permanent deprivation of the property. In addition, although another individual appeared to be going through Farias' pockets, there was no evidence to support the notion that Appellant aided in that effort to warrant a conviction as an accomplice, or to satisfy the element of intent to deprive the owner of any property. Finally, there was insufficient evidence presented that Farias suffered serious bodily injury, necessary to warrant a conviction for aggravated robbery. The officer testified that, upon his arrival, Farias was unconscious and had numerous scrapes and bruises, but offered no evidence of any permanent damage or protracted loss of any bodily function.

As it relates to Calvillo, there was insufficient evidence to support Appellant's conviction for Aggravated Robbery under accomplice liability. The evidence demonstrated that Appellant never assaulted Calvillo, nor took anything from him. Appellant was merely present after Joe assaulted Calvillo, and watched as his wallet was taken from him. There was no evidence presented that Appellant assisted or encouraged this activity, and therefore no reasonable jury could have convicted Appellant under the accomplice liability theory.

The trial court committed plain error in admitting the surveillance video tape of the incident without sufficient foundation and testimony demonstrating that the events depicted on the tape accurately reflected what happened. The video was admitted through the police officer who responded to the scene after the fight was over. Therefore, he could not testify that the events prior to that time were accurately represented on the video, nor did he testify as to the standard operations of the video, and that it was properly functioning on the evening in question. The prejudice suffered by Appellant was his right to a fair trial and his right to confront and cross-examine witnesses given that one of the alleged victims, Farias, did not even testify at trial.

Appellant's trial counsel also rendered ineffective assistance by not objecting to the trial court's admission of the video tape, absent sufficient foundation. The analogous argument under plain error also satisfies the ineffective assistance of counsel claim, in that Appellant was prejudiced by the admission given that it was the only evidence presented as to the alleged victim, Farias, and his right to confront and cross-examine Farias was violated.

ARGUMENT

POINT I

THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO CONVICT APPELLANT OF AGGRAVATED ROBBERY IN COUNT I, AS IT RELATED TO THE ALLEGED VICTIM, JOSE FARIAS

A. Standard of Review

In a jury trial, the jury serves as the exclusive judge of both the credibility of witnesses and the weight to be given particular evidence. This court reverses a jury verdict only if, after viewing all the evidence and inferences therefrom in the light most favorable to that verdict, it finds the evidence "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed the crime of which he was convicted." *State v. Baker*, 963 P.2d 801 (Utah Ct. App. 1998), *citing State v. Span*, 819 P.2d 329, 332 (Utah 1991)(other citations omitted).

B. Marshaling the Evidence

Appellant has the burden of marshaling the evidence in an insufficiency claim.[3] As such, the facts set forth in the above Statement of Facts provide the testimony in

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[3] "It is well established that a defendant's burden on appeal when challenging the sufficiency of the evidence after a jury trial is to 'marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.'" *State v. Hopkins*, 1999 UT 98, ¶ 14, 989 P.2d 1065.

the light most favorable to the State. In summary, the following facts supported the jury's finding of guilt. Appellant and two others arrived at Betos restaurant. As Appellant was at the counter ordering food, Farias approached on his blind side and Appellant started hitting him. During the course of the fight, Appellant pulled out Farias' eyebrow ring and threw it at him. Farias received cuts, bruises and abrasions and was unconscious when the police first arrived on the scene. Farias did not testify at trial, but a video tape of the incident was recorded from the restaurant surveillance cameras. From the video, it appears that while Farias was on the ground, George looked through his pockets and Appellant admitted to patting him down for a weapon.

C. Evidence was Insufficient

The relevant elements of aggravated robbery in this instant case are set forth as follows:

> 1) A person commits aggravated robbery if in the course of committing robbery, he . . . (b) causes serious bodily injury upon another.

Utah Code Ann. § 76-6-302 (1953, as amended).

> (1) A person commits robbery if: (a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear.

Utah Code Ann. § 76-6-301 (1953, as amended).

1. Insufficient Evidence of a Taking Against the Will of Another

The first level of analysis begins with whether there was sufficient evidence to support a conviction for a robbery, which is the taking of personal property of another, against his will, by force or fear. As it relates to Farias, the evidence of a taking or attempting taking was the issue of the eyebrow ring which was removed and left at the scene. The only testimony as to a taking was Redding's testimony that Appellant removed the eyebrow ring, but there was no testimony as to what happened to it from anyone other than Appellant. Appellant stated that he did not take it with him, but that he threw it back at Farias. Appellant submits that the evidence presented is not sufficient to prove beyond a reasonable doubt that there was a taking.

To be guilty of aggravated robbery, a person must unlawfully and intentionally take property from the possession of another. The meaning of "take" is not defined by the statutory language of sections 76-6-301 or 76-6-302 so the Court will look to the plain language to interpret its meaning. *See, e.g., Olsen v. Samuel McIntyre Investment Co.*, 956 P.2d 257, 259 (Utah 1998). A criminal taking is "[t]he act of seizing an article, with or without removing it, but with an implicit transfer of possession or control." Black's Law

Dictionary (7th ed. 1999). Similarly, "take" means "1) to get into one's hands or into one's possession, power, or control by force or stratagem: as a: to seize or capture physically . . . 6) to transfer into one's own keeping: enter into or arrange for possession, ownership, or use of." Webster's Third New International Dictionary. As interpreted in Utah, there "is no 'taking' from the immediate presence of another until the victim loses the ability to exercise control over the property." *State v. D.B.*, 925 P.2d 178, 181 (Utah App. 1996), (citing *Webb v. State*, 732 P.2d 478, 479 (Okla. App.), *cert. denied*, 482 U.S. 930 (1987) (defining possession as "the ability to exercise one's power over the personal property")).

Appellant submits that he did not take the eyebrow ring from Farias, as required by section 76-6-301. Rather, he used the ring as a weapon against Farias and essentially cause pain relative to an assault against him. The evidence never demonstrated beyond a reasonable doubt that Appellant ever gained possession or control of the eyebrow ring with the purpose to deprive Farias of it. Accepting that Appellant's conduct could support a taking under the robbery statute, then every person, attacker or victim alike, who uses another person's property as a weapon against the person, will be equally guilty of robbery. This would mean that any person engaged in a fight or in self-defense, who temporarily grabs hold of his opponent's property to use as a weapon against the opponent,

even if the property never leaves the opponent's possession, would be guilty of robbery, which is clearly inconsistent with a common-sense interpretation of this statute.

Assuming *arguendo* that this Court finds sufficient evidence of a taking, there was no evidence presented to support that it was against the will of Farias. Farias did not testify at trial, and there was no other evidence presented through other witnesses to support the element that a taking was without permission of the person or against his will. As such, the jury erred in finding beyond a reasonable doubt that Appellant was guilty of aggravated robbery.

2. Insufficient Evidence of a Taking Under Accomplice Liability

Further, the evidence presented at trial, from witnesses as well as the video, was that someone other than Appellant was going through Farias' pockets and that Appellant merely patted him down to make sure he did not have a weapon. This evidence similarly does not qualify as a taking for purposes of the robbery statute. Under accomplice liability, Appellant also submits that when another individual was going through Farias' pockets, that was a separate, independent act, for which accomplice liability cannot be sustained. The accomplice liability statute states:

> Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests,

> commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

Utah Code Ann. § 76-2-202 (1953, as amended). No evidence was presented at trial that Appellant solicited, requested, commanded, encouraged or intentionally aided another to engage in a taking. In *State in re V.T.*, 2000 UT App 189, 5 P.3d 1234, the Court of Appeals reversed defendant's conviction for theft of a camcorder based upon insufficient evidence under the accomplice liability theory. In *V.T.*, the evidence demonstrated that V.T. and two friends were at a relative's apartment. The relative discovered guns and a camcorder missing after the three left and called police. *Id.* at ¶ 2-3. The police discovered the camcorder at a pawn shop, with a video inside which depicted V.T. and the two other individuals, where one individual was talking on the telephone discussing pawning the stolen camcorder. V.T. did not say anything on the video. *Id.* at ¶ 4-5. The court held that passive behaviors, such as mere presence, even a continuous presence, absent some affirmative act to instigate or incite the behavior was not enough to qualify as encouragement under the accomplice liability statute and reversed Appellant's conviction for theft. *Id.* at ¶ 10, 16-17.

The facts in the instant case do not support a finding beyond a reasonable doubt that Appellant encouraged, incited, aided or commanded the others in seeking to accomplish a taking of property of another. Under the rationale of accomplice liability, a

defendant "must knowingly, voluntarily, and with common intent unite with the principal offenders in the commission of the crime." *State v. Carson*, 950 S.W.2d 951, 954 (Tenn. 1997). Compare the facts in the instant case to cases where this Court has held sufficient evidence for accomplice liability. In *State v. Smith*, 706 P.2d 1052 (Utah 1985), the defendant aided in the robbery by recruiting a co-defendant to assist, picking the house to rob, and providing and driving the getaway car. *Id.* In *State v. Webb*, 790 P.2d 65 (Utah Ct. App. 1990), an aggravated robbery conviction was upheld under the accomplice liability theory based upon the fact that the defendant had solicited a co-defendant to steal the getaway car, and that he and the co-defendants sorted through the stolen jewelry at a friend's house. These two cases demonstrate the type of evidence and the quantum of evidence needed to satisfy an accomplice liability conviction. The facts presented in the instant case fall far short of such proof beyond a reasonable doubt of accomplice liability in the taking or attempting taking of property from Farias.

What the evidence does suggest, is the presence of the "mere presence" doctrine. Under this doctrine, the fact that a defendant is present during the commission of an offense, or even has prior knowledge of the offense, does not make him an accomplice when he neither advises, instigates, encourages or assists in perpetration of the crime. *State v. Labrum*, 959 P.2d 120, 123 (Utah Ct. App. 1998); *see also State in re V.T.*, *supra* (passive

behavior such as mere presence – even continuous presence – absent evidence that the defendant affirmatively did something to instigate, incite, embolden or help others commit a crime is not enough to qualify as "encouragement").

Consequently, the evidence was lacking to support accomplice liability for a taking and a reasonable jury could not have found guilty beyond a reasonable doubt sufficient to warrant the aggravated robbery conviction.

3. Insufficient Evidence of Intent to Commit a Robbery

To commit a robbery, the defendant must have intended to commit the crime of robbery. *State v. Kazda*, 392 P.2d 486, 488 (Utah 1964). The intent to commit robbery is the intent to permanently deprive the rightful owner of his property. *State v. Potter*, 627 P.2d 75, 80-81 (Utah 1981) (concurring) (citing *People v. Hughes*, 39 P. 492 (1895)); *see also Crawford v. Commonwealth*, 231 S.E.2d 309, 310 (Va. 1977) (following the common law meaning of robbery which requires intent to steal); *State v. Hudson*, 206 S.E.2d 415 (W. Va. 1974) (following the common law meaning of robbery which requires intent to steal, which is the "intent to feloniously deprive the owner permanently of his property"); *State v. Lawrence*, 136 S.E.2d 595, 599-600 (N.C. 1964) (holding an essential element of common law robbery is a "taking with the felonious intent" to "deprive the owner of his property permanently"). Appellant submits that there was no evidence of his intent in this

regard presented at trial. Although another individual may have attempted to go through Farias' pockets in an effort to take something, that was not a natural and probable consequence of an assault, for which Appellant can be held responsible under accomplice liability.

So important is the element of intent that a defendant may even be convicted of robbery for a botched robbery attempt if he had the intent to deprive the owner of his property. *See, e.g., State v. Hollen*, 1999 UT App 123, 982 P.2d 90 (holding a defendant who pointed a gun at an employee's face and instructed the employee to "get the money" could be convicted of aggravated robbery even though he became frightened and left without the money); *State v. Cantu*, 750 P.2d 591 (Utah 1988) (holding a defendant who "accosted the victim with a knife and club and demanded to know where she kept her silver and gold" could be convicted of aggravated robbery even though he did not take anything from the victim).

The intent to deprive the owner of his property "can be inferred by defendant's conduct and the attendant circumstances testified to by the witnesses." *State v. Romero*, 554 P.2d 216, 218 (Utah 1976). However, no evidence in Appellant's case can be used to infer that he took hold of the eyebrow ring with intent to permanently deprive Farias of it. Defendant was fighting with Farias, who had a ring protruding from his eyebrow. When

fighting, body jewelry becomes a prime target because it is easily-reached, and can be used to inflict pain. When Appellant grabbed the eyebrow ring, he did not intend to permanently deprive the owner of it; he intended to inflict pain. This is evidenced by the fact that, after grabbing the ring, he immediately threw the ring back at Farias. *See Smith v. State*, 534 S.E.2d 903 (Ga. Ct. App. 2000)(defendant's aggravated robbery conviction reversed where evidence demonstrated that defendant made a demand for money, but there was no evidence that he actually took money).

Consequently, this evidence presented at trial in the light most favorable to the State, cannot support any intent by Appellant to permanently deprive the owner of any property beyond a reasonable doubt.

4. Insufficient Evidence of Serious Bodily Injury

The next level of analysis is whether there was sufficient evidence presented to warrant the conviction for an aggravated robbery, by causing serious bodily injury. The statute defines "serious bodily injury" as:

> bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

Utah Code Ann. § 76-1-601 (1953, as amended). Serious bodily injury is "the most severe type of bodily injury in Utah's three-tiered scheme." *State v. Leleae*, 993 P.2d 232, 237 (Utah App. 1999). It is "bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death." Utah Code Ann. § 76-1-601(10). Injury "not amounting to serious bodily injury" is substantial bodily injury and does not fall under the aggravated robbery statute. Utah Code Ann. § 76-1-601(11).

In *State v. Bryant*, 965 P.2d 539 (Utah App. 1998), the Court found an instruction pertaining to serious bodily injury was clearly proper for the jury because the "[t]estimony of 'loss or impairment of function' was clear and uncontradicted." *Id.* at 544. However, the Court found a serious bodily injury instruction more questionable, though ultimately still appropriate, when the evidence showed a "broken jaw that [was] wired shut for six weeks with resulting eating difficulties, weight loss, extraction and later replacement of a tooth, and continuing pain." *Leleae*, 993 P.2d at 238.

The only evidence in Appellant's case as to bodily injury was offered by Huggard, who testified that Farias had scrapes and bruises, and was unconscious when he arrived. None of these injuries is likely to amount to serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or substantial

risk of death. In addition, Farias himself did not testify at trial. Huggard's opinion as to what injuries Farias may have suffered is not sufficient to meet the definition of serious bodily injury.

Appellant submits that, at most, the evidence satisfies proof beyond a reasonable doubt that the offense of Aggravated Assault, a third degree felony, was committed, and Appellant's conviction should be reduced accordingly.[4]

POINT II

THERE WAS INSUFFICIENT EVIDENCE PRESENTED AT TRIAL TO CONVICT APPELLANT OF AGGRAVATED ROBBERY IN COUNT II, AS IT RELATED TO THE ALLEGED VICTIM, GABRIEL CALVILLO

A. Standard of Review

In a jury trial, the jury serves as the exclusive judge of both the credibility of witnesses and the weight to be given particular evidence. This court reverses a jury verdict only if, after viewing all the evidence and inferences therefrom in the light most favorable to that verdict, it finds the evidence "sufficiently inconclusive or inherently improbable that reasonable minds must have entertained a reasonable doubt that the defendant committed

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[4] The trial court did instruct the jury as to the lesser offenses of assault causing substantial bodily injury and assault. *See* Jury Instruction Nos. 27 and 28 (R.38-39).

the crime of which he was convicted." *State v.* Baker, 963 P.2d 801 (Utah Ct. App. 1998), *citing State v. Span*, 819 P.2d 329, 332 (Utah 1991)(other citations omitted).

B. Marshaling the Evidence

Appellant has the burden of marshaling the evidence in an insufficiency claim.[5] As such, the facts set forth in the above Statement of Facts provide the testimony in the light most favorable to the State. In summary, the following facts supported the jury's finding of guilt. As already set forth in Point I above, Appellant and two other entered Betos restaurant and became involved in a fight with Farias and Calvillo. However, Appellant and George were fighting with Farias, and Joe was fighting with Calvillo. There was no evidence presented at trial that Appellant ever assaulted or physically touched Calvillo in any way. The video of the incident in the restaurant reveals that Appellant's fight with Farias was taking place at the same time as Joe was fighting with Calvillo. When Joe left the restaurant, Appellant and George walked over to Calvillo, but George went through Calvillo's pockets and took his wallet. Appellant was merely watching as George took the

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[5] "It is well established that a defendant's burden on appeal when challenging the sufficiency of the evidence after a jury trial is to 'marshal the evidence in support of the verdict and then demonstrate that the evidence is insufficient when viewed in the light most favorable to the verdict.'" *State v. Hopkins*, 1999 UT 98, ¶ 14, 989 P.2d 1065.

wallet. There was no testimony from any witness as to whether Appellant encouraged or aided in this activity.

C. Evidence was Insufficient

Again, the relevant elements of aggravated robbery in the instant case are set forth as follows:

> 1) A person commits aggravated robbery if in the course of committing robbery, he . . . (b) causes serious bodily injury upon another.

Utah Code Ann. § 76-6-302 (1953, as amended).

> (1) A person commits robbery if: (a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear.

Utah Code Ann. § 76-6-301 (1953, as amended).

1. Insufficient Evidence of Accomplice Liability for Robbery

As to Calvillo, there is no dispute that the evidence presented at trial outlines that Appellant never physically touched Calvillo during the course of the fight at the restaurant. From the witness testimony as well as the video, Appellant was not part of the assault which took place against Calvillo, and Appellant testified that he was not aware that Joe was even fighting with Calvillo until it was all over. Furthermore, the video reveals that

Appellant was standing next to George as he went through Calvillo's pockets, but there is no evidence that Appellant offered any assistance or encouragement. The analysis of insufficient evidence with regard to Calvillo begins with whether the evidence supported a conviction for a robbery under accomplice liability. Appellant submits that his mere presence as it relates to Calvillo, and the separate independent and unforeseeable act of another taking his wallet, do not meet the parameters necessary to hold Appellant liable as an accomplice. The accomplice liability statute states:

> Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

Utah Code Ann. § 76-2-202 (1953, as amended). No evidence was presented at trial that Appellant solicited, requested, commanded, encouraged or intentionally aided another to engage in a taking. As argued in Point I above, as it related to Farias, the same analysis in *State in re V.T.*, *supra*, applies. The assault and robbery that took place against Calvillo, was in no way aided, encouraged or assisted by Appellant. Even assuming there was a joint agreement between the parties to assault Farias and Calvillo, the unforeseeable act of taking Calvillo's wallet was not part of that common scheme. There was no evidence presented at trial to indicate that the parties formed that plan or assisted each other in carrying it out.

As argued in Point II above, the facts in the instant case are insufficient to hold Appellant liable as an accomplice when compared to other cases where the appellate courts have found sufficient evidence for accomplice liability. In *State v. Smith*, 706 P.2d 1052 (Utah 1985), the defendant aided in the robbery by recruiting a co-defendant to assist, picking the house to rob, and providing and driving the getaway car. *Id.* In *State v. Webb*, 790 P.2d 65 (Utah Ct. App. 1990), an aggravated robbery conviction was upheld under the accomplice liability theory based upon the fact that the defendant had solicited a co-defendant to steal the getaway car, and that he and the co-defendants sorted through the stolen jewelry at a friend's house.

Again, the evidence as it relates to Calvillo suggests only that Appellant was present during the commission of the offense against him. Under the "mere presence" doctrine, liability cannot be maintained by Appellant on this count. Under the mere presence theory, the fact that a defendant is present during the commission of an offense, or even has prior knowledge of the offense, he is not an accomplice when he neither advises, instigates, encourages or assists in perpetration of the crime. *State v. Labrum*, 959 P.2d 120, 123 (Utah Ct. App. 1998); *see also State in re V.T.*, *supra* (passive behavior such as mere presence – even continuous presence – absent evidence that the defendant affirmatively did something

to instigate, incite, embolden or help others commit a crime is not enough to qualify as "encouragement").

There was no evidence presented that Appellant assaulted Calvillo in any way. Furthermore, as Appellant was leaving the restaurant, someone else searched Calvillo's pockets while Appellant looked on. This conduct squarely fits within the notion of mere presence or knowledge of an offense with nothing more. Consequently, the evidence failed to establish Appellant's responsibility under accomplice liability for an aggravated robbery, such that reasonable minds must have entertained reasonable doubt.

2. Insufficient Evidence of Intent to Commit a Robbery Under Accomplice Liability

To be liable as an accomplice in the commission of the robbery, the defendant must have intended to commit the crime of robbery in the same vein as the principal. *State v. Kazda*, 392 P.2d 486, 488 (Utah 1964). The intent to commit robbery is the intent to permanently deprive the rightful owner of his property. *State v. Potter*, 627 P.2d 75, 80-81 (Utah 1981) (concurring) (citing *People v. Hughes*, 39 P. 492 (1895)). Although the evidence may have been sufficient to find that another had the intent to commit a robbery when taking Calvillo's wallet, Appellant submits that there was no evidence of his intent in this regard. Although another individual took property from Calvillo, again that was not

a natural and probable consequence of an assault, for which Appellant should be held responsible under accomplice liability.

The intent to deprive the owner of his property "can be inferred by defendant's conduct and the attendant circumstances testified to by the witnesses." *State v. Romero*, 554 P.2d 216, 218 (Utah 1976). However, no evidence in Appellant's case can be used to infer that he aided, assisted or encouraged another with the same intent to take property from Calvillo. The facts presented in the instant case fall far short of such proof beyond a reasonable doubt of accomplice liability in the taking of property from Calvillo.

Consequently, this evidence presented at trial in the light most favorable to the State, cannot support any intent by Appellant to permanently deprive the owner of any property beyond a reasonable doubt.

POINT III

THE TRIAL COURT COMMITTED PLAIN ERROR IN ADMITTING THE VIDEO TAPE OF THE INCIDENT ABSENT PROPER FOUNDATION

A. Standard of Review in Plain Error Analysis

Because Appellant's trial counsel did not object to the introduction of the video tape, this Court may still consider such argument under the plain error analysis or to avoid manifest injustice. *See State v. Saunders*, 1999 UT 59, ¶ 30, 992 P.2d 951, 961 (Utah

1999); *State v. Rudolph*, 970 P.2d 1221 (Utah 1998)[6]. In order to demonstrate plain error, defendant must show: 1) error, 2) that the error should have been obvious to the trial court, and 3) that the error was harmful. *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993).

B. Error

Appellant submits that proper foundation was not laid to admit the video tape of the incident. There was no testimony either from the officer or the witness, Redding, that the events depicted were an accurate representation of the actual fight. Huggard could only testify that the blood which was left in the restaurant and the victims who were present when he arrived were accurately depicted from the video. Huggard was not present during the fight and could not testify that those events were accurately depicted, as required for a proper foundation. The video was admitted into evidence through Huggard. Redding merely testified to events as they happened while the video was playing, but never indicated that the video was an accurate depiction of those events.

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[6] *See also Gov't of Virgin Islands v. Smith*, 949 F.2d 677 (3rd Cir. 1991)(holding that in the absence of objection at trial relative to instructing the jury on the State's burden of disproving self-defense, such error was sufficiently obvious to permit the court on appeal to consider it); *State v. McCullum*, 656 P.2d 1064 (Wash. 1983)(holding that defense counsel's failure to offer burden of proof instruction regarding self-defense, nor his objection to this lack of instruction was still an issue entitled to be reviewed on appeal).

Rule 901 of the Utah Rules of Evidence states in relevant part that: "the requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Utah R. Evid. 901(a) (2001). In order to conform to this requirement, a witness must provide "testimony that a matter is what it is claimed to be" based upon personal knowledge. Utah R. Evid. 901(b)(1)(2001). In order to authenticate or identify a photograph (or video in this case) to qualify under the appropriate foundation requirements, a competent witness with personal knowledge of the facts represented by the video must testify that it accurately reflects those facts. *Sate v. Purcell*, 711 P.2d 243 (Utah 1985); *see also State v. Hygh*, 711 P.2d 264 (Utah 1985)(holding that photographic evidence illustrative of a witness's testimony only becomes admissible when the sponsoring witness can testify that it is a fair and accurate representation of the subject matter based on that witness's personal observation).

Huggard did not have personal knowledge as to the facts represented on the video prior to his arrival at the scene; i.e., the fight which ensued prior to his arrival. As such, the proper foundation was not laid for the admissibility of the video. Similarly, although Redding testified as to certain events which occurred as the video was playing for

the jury, she never testified that what was depicted was an accurate representation of what actually took place in the restaurant, based upon her personal observations.

C. Obviousness of Error to the Trial Court

Because the Rules of Evidence specifically outline what constitutes proper foundation and authentication for photographic evidence, Huggard's complete absence of any personal knowledge to authenticate the acts depicted on the video should have been obvious to the trial court. Moreover, there was no testimony from any of the State's witnesses indicating that the acts depicted on the video tape were a fair and accurate representation of what was actually taking place at the time. Appellant submits that the complete lack of foundation or authentication for the video from any witness should have been obvious to the trial court sufficient to constitute plain error.

D. Harmfulness and Prejudice to Appellant

The plain error analysis as well as error claimed by improperly admitted evidence requires that Appellant demonstrate harmfulness or prejudice by the erroneous admission. In *State v. Purcell*, 711 P.2d 243 (Utah 1985), this Court held that it would not reverse a trial court's ruling on admissibility of evidence absent a showing that the error affected a defendant's substantial rights. Appellant submits that the prejudice from the

improper admission of the video is that fact that absent the video, there was no independent witness testimony to demonstrate the elements of the offense. The erroneous admission of the video tape also affected Appellant's substantial right to confront and cross-examine witnesses given that Farias did not testify at trial. Both the Utah Constitution and the United States Constitution provide that among the rights of an accused is the right to be confronted by the witnesses against him. *See* U.S. Const. amend. VI; Utah Const. art 1, sec. 12. The substantive evidence admitted at trial as to any alleged serious bodily injury or that any property was taken or attempted to be taken without consent as it related to Farias, was the video tape.

As Appellant argues below, there was insufficient evidence to prove beyond a reasonable doubt that Appellant took property without the consent of Farias, or inflicted serious bodily injury. As such, the video tape cannot demonstrate those elements beyond a reasonable doubt without some personal eyewitness testimony. Consequently, because the video was not admitted into evidence with the proper authentication and foundation, Appellant was prejudiced and he was denied his right to a fair trial and an opportunity to confront and cross-examine the witnesses against him, pursuant to the Fifth and Sixth Amendments of the United States Constitution and Article 1, section 12 of the Utah Constitution.

POINT IV

APPELLANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHICH PREJUDICED HIS RIGHTS UNDER THE SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION

A. Standard of Review

To prevail on an ineffectiveness claim, a defendant must show: "(1) that counsel's performance was deficient, and (2) that the deficient performance prejudiced the defendant." *State v. Classon*, 935 P.2d 524 (Utah Ct. App. 1997), *citing Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

B. Trial Counsel's Deficient Performance

Appellant submits that trial counsel's failure to object to the admissibility of the video tape, "fell below an objective standard of reasonableness" as guaranteed by his Sixth Amendment right to counsel. *Classon*, 935 P.2d at 532. Appellant's trial counsel failed to object to the State's admission of the video absent sufficient foundation. As argued in Point III, above, this error is especially harmful given the fact that Appellant was unable to cross-examine Farias as to what allegedly occurred from is perspective The Utah Supreme Court in *Classon* also stated that when defendants make such claims of ineffectiveness, they must overcome the presumption that "counsel's challenged action or omission was sound

trial strategy." *Id.* Appellant submits that the presumption is overcome by the notion that there is no rational basis for which failure to object to the video's admission would be strategic. The admission of the video essentially provide evidence against Appellant as to Count I without ever having the alleged victim testify or be subject to cross-examination.

C. *The Error of Trial Counsel Prejudiced Appellant's Right to Effective Assistance of Counsel and a Fair Trial*

This Court has held that the *Strickland* standard does not end the analysis under and ineffective assistance claim, and that "the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *State v. Classon*, 935 P.2d 524 (Utah Ct. App. 1997). Appellant submits that when considering that he was prevented from cross-examining a key witness for the State, the admission of the video tape clearly prejudiced his right to a fair trial, and his counsel's deficiency would have resulted in a different outcome. Absent the improper admission of the video, the jury had no evidence to consider as it related to Farias.

Even though the court in *Classon* held that the *Strickland* test was not met, they further looked at the claimed errors in light the defendant's fundamental right to a fair proceeding. *Classon*, 935 P.2d at 533. As noted there, "the right to counsel plays a crucial

role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Id.* Consequently, the adversarial process was so undermined that the trial in the instant case cannot be relied upon as having produced a just result. *Id.*

CONCLUSION AND PRECISE RELIEF SOUGHT

Based upon the foregoing, Appellant respectfully requests this Court reduce the conviction on Count I involving Farias to an aggravated assault and reverse his conviction as to Count II involving Calvillo; and/or grant him a new trial.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests oral argument in the above matter.

RESPECTFULLY SUBMITTED this _____ day of May, 2002.

YENGICH, RICH & XAIZ
Attorneys for Defendant/Appellant

By _____
RONALD J. YENGICH

CERTIFICATE OF SERVICE

I hereby declare that I mailed/delivered two true and correct copies of the foregoing Appellant's Opening Brief, postage prepaid, this _____ day of May, 2002, to:

J. Frederick Voros, Jr.
Assistant Attorney General
Criminal Appeals Division
160 East 300 South, Sixth Floor
Salt Lake City, Utah 84114

ADDENDUM I

JUDGMENT

THIRD DISTRICT COURT SALT LAKE COURT
SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff,	:	MINUTES RE-SENTENCING SENTENCE, JUDGMENT, COMMITMENT
vs.	:	Case No: 001904749 FS
KONAI BLOOMFIELD, Defendant.	:	Judge: ROGER A. LIVINGSTON Date: March 15, 2002

PRESENT
Clerk: christef
Prosecutor: KELLY SHEFFIELD
Defendant
Defendant's Attorney(s): BRADLEY RICH

DEFENDANT INFORMATION
Date of birth: July 28, 1975
Video
Tape Number: 031502 Tape Count: 9:48

CHARGES

1. AGGRAVATED ROBBERY - 1st Degree Felony
   Plea: Guilty - Disposition: 08/14/2000 {Guilty Plea}
2. AGGRAVATED ROBBERY - 1st Degree Felony
   Plea: Guilty - Disposition: 08/14/2000 {Guilty Plea}

HEARING

Based upon the stipulation of the parties, the previous sentence is vacated. Defendant is sentenced nun pro tunc as follows: Count I, 5 to life. Count II, 5 to life. Count I to run concurrently with Count II with CTS from the date of original sentencing.

Case No: 001904749
Date: Mar 15, 2002

SENTENCE PRISON

Based on the defendant's conviction of AGGRAVATED ROBBERY a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

Based on the defendant's conviction of AGGRAVATED ROBBERY a 1st Degree Felony, the defendant is sentenced to an indeterminate term of not less than five years and which may be life in the Utah State Prison.

To the SALT LAKE County Sheriff: The defendant is remanded to your custody for transportation to the Utah State Prison where the defendant will be confined.

SENTENCE PRISON CONCURRENT/CONSECUTIVE NOTE

Count I to run concurrently with Count II with CTS from date of original sentencing 11-9-00 and full restitution is ordered.

Dated this 15 day of March, 2002.

ROGER A. LIVINGSTON
District Court Judge

ADDENDUM II

RELEVANT CONSTITUTIONAL PROVISIONS, STATUTES & RULES

AMENDMENT I

[Religious and political freedom.]
Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT II

[Right to bear arms.]
A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

AMENDMENT III

[Quartering soldiers.]
No Soldier shall, in time of peace, be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

AMENDMENT IV

[Unreasonable searches and seizures.]
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

[Criminal actions — Provisions concerning — Due process of law and just compensation clauses.]
No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

[Rights of accused.]
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

AMENDMENT VII

[Trial by jury in civil cases.]
In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

AMENDMENT VIII

[Bail — Punishment.]
Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

AMENDMENT IX

[Rights retained by people.]
The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

AMENDMENT X

[Powers reserved to states or people.]
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

AMENDMENT XI

[Suits against states — Restriction of judicial power.]
The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

AMENDMENT XII

[Election of President and Vice-President.]
The Electors shall meet in their respective states, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President, and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the Government of the United States, directed to the President of the Senate;—The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates and the votes shall then be counted;—The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the House of Representatives shall not choose a President whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President.—The person having the greatest number of votes as Vice-President, shall be the Vice-President, if such number be a majority of the whole number of Electors appointed, and if no person have a majority, then from the two highest numbers on the list, the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

ec. 7. [Due process of law.]
No person shall be deprived of life, liberty or property, ithout due process of law. 1896

ec. 8. [Offenses bailable.]
(1) All persons charged with a crime shall be bailable cept:
(a) persons charged with a capital offense when there is substantial evidence to support the charge; or
(b) persons charged with a felony while on probation or parole, or while free on bail awaiting trial on a previous felony charge, when there is substantial evidence to support the new felony charge; or
(c) persons charged with any other crime, designated by statute as one for which bail may be denied, if there is substantial evidence to support the charge and the court finds by clear and convincing evidence that the person would constitute a substantial danger to any other person or to the community or is likely to flee the jurisdiction of the court if released on bail.
(2) Persons convicted of a crime are bailable pending appeal ıly as prescribed by law. 1988 (2nd S.S.)

ec. 9. [Excessive bail and fines — Cruel punishments.]
Excessive bail shall not be required; excessive fines shall not ɜ imposed; nor shall cruel and unusual punishments be ıflicted. Persons arrested or imprisoned shall not be treated ith unnecessary rigor. 1896

ec. 10. [Trial by jury.]
In capital cases the right of trial by jury shall remain ıviolate. In capital cases the jury shall consist of twelve ɜrsons, and in all other felony cases, the jury shall consist of ɔ fewer than eight persons. In other cases, the Legislature ıall establish the number of jurors by statute, but in no event ıall a jury consist of fewer than four persons. In criminal ıses the verdict shall be unanimous. In civil cases three-urths of the jurors may find a verdict. A jury in civil cases ıall be waived unless demanded. 1996

ec. 11. [Courts open — Redress of injuries.]
All courts shall be open, and every person, for an injury done ɔ him in his person, property or reputation, shall have ɜmedy by due course of law, which shall be administered ithout denial or unnecessary delay; and no person shall be ɜrred from prosecuting or defending before any tribunal in ıis State, by himself or counsel, any civil cause to which he is party. 1896

ec. 12. [Rights of accused persons.]
In criminal prosecutions the accused shall have the right to ppear and defend in person and by counsel, to demand the ature and cause of the accusation against him, to have a copy ıereof, to testify in his own behalf, to be confronted by the itnesses against him, to have compulsory process to compel ıe attendance of witnesses in his own behalf, to have a ɔeedy public trial by an impartial jury of the county or ıstrict in which the offense is alleged to have been committed, ıd the right to appeal in all cases. In no instance shall any ɔcused person, before final judgment, be compelled to adıance money or fees to secure the rights herein guaranteed. he accused shall not be compelled to give evidence against ımself; a wife shall not be compelled to testify against her usband, nor a husband against his wife, nor shall any person ɜ twice put in jeopardy for the same offense.
Where the defendant is otherwise entitled to a preliminary ɛamination, the function of that examination is limited to ɜtermining whether probable cause exists unless otherwise rovided by statute. Nothing in this constitution shall preude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule. 1994

Sec. 13. [Prosecution by information or indictment — Grand jury.]
Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature. 1947

Sec. 14. [Unreasonable searches forbidden — Issuance of warrant.]
The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized. 1896

Sec. 15. [Freedom of speech and of the press — Libel.]
No law shall be passed to abridge or restrain the freedom of speech or of the press. In all criminal prosecutions for libel the truth may be given in evidence to the jury; and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives, and for justifiable ends, the party shall be acquitted; and the jury shall have the right to determine the law and the fact. 1896

Sec. 16. [No imprisonment for debt — Exception.]
There shall be no imprisonment for debt except in cases of absconding debtors. 1896

Sec. 17. [Elections to be free — Soldiers voting.]
All elections shall be free, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage. Soldiers, in time of war, may vote at their post of duty, in or out of the State, under regulations to be prescribed by law. 1896

Sec. 18. [Attainder — Ex post facto laws — Impairing contracts.]
No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall be passed. 1896

Sec. 19. [Treason defined — Proof.]
Treason against the State shall consist only in levying war against it, or in adhering to its enemies or in giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act. 1896

Sec. 20. [Military subordinate to the civil power.]
The military shall be in strict subordination to the civil power, and no soldier in time of peace, shall be quartered in any house without the consent of the owner; nor in time of war except in a manner to be prescribed by law. 1896

Sec. 21. [Slavery forbidden.]
Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within this State. 1896

Sec. 22. [Private property for public use.]
Private property shall not be taken or damaged for public use without just compensation. 1896

Sec. 23. [Irrevocable franchises forbidden.]
No law shall be passed granting irrevocably any franchise, privilege or immunity. 1896

the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Requirement of authentication or identification.

(a) *General provision.* The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims

(b) *Illustrations.* By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence 20 years or more at the time it is offered.

(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods provided by statute or rule.* Any method of authentication or identification provided by court rule or statute of this state.

Rule 902. Self-authentication.

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) *Domestic public documents under seal.* A document bearing a seal purporting to be that of the United States, or of any state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

(2) *Domestic public documents not under seal.* A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in Paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) *Foreign public documents.* A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) *Certified copies of public records.* A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with Paragraph (1), (2), or (3) of this rule or complying with any law of the United States or of this state.

(5) *Official publications.* Books, pamphlets, or other publications purporting to be issued by public authority.

(6) *Newspapers and periodicals.* Printed materials purporting to be newspapers or periodicals.

(7) *Trade inscriptions and the like* Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) *Acknowledged documents.* Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) *Commercial paper and related documents.* Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

(10) *Methods provided by statute or rule.* Any method of authentication or identification provided by court rule, statute, or as provided in the constitution of this state.

Rule 903. Subscribing witness' testimony unnecessary.

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions.

For purposes of this article the following definitions are applicable:

(1) *Writings and recordings.* "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating,

76-1-601. **Definitions.**

Unless otherwise provided, the following terms apply to this title:

(1) "Act" means a voluntary bodily movement and includes speech.

(2) "Actor" means a person whose criminal responsibility is in issue in a criminal action.

(3) "Bodily injury" means physical pain, illness, or any impairment of physical condition.

(4) "Conduct" means an act or omission.

(5) "Dangerous weapon" means:

(a) any item capable of causing death or serious bodily injury; or

(b) a facsimile or representation of the item; and:

(i) the actor's use or apparent intended use of the item leads the victim to reasonably believe the item is likely to cause death or serious bodily injury; or

(ii) the actor represents to the victim verbally or in any other manner that he is in control of such an item.

(6) "Offense" means a violation of any penal statute of this state.

(7) "Omission" means a failure to act when there is a legal duty to act and the actor is capable of acting.

(8) "Person" means an individual, public or private corporation, government, partnership, or unincorporated association.

(9) "Possess" means to have physical possession of or to exercise dominion or control over tangible property.

(10) "Serious bodily injury" means bodily injury that creates or causes serious permanent disfigurement, protracted loss or impairment of the function of any bodily member or organ, or creates a substantial risk of death.

(11) "Substantial bodily injury" means bodily injury, not amounting to serious bodily injury, that creates or causes protracted physical pain, temporary disfigurement, or temporary loss or impairment of the function of any bodily member or organ.

(12) "Writing" or "written" includes any handwriting, typewriting, printing, electronic storage or transmission, or any other method of recording information or fixing information in a form capable of being preserved.

76>-<2>-<202. **Criminal responsibility for direct commission of offense or for conduct of another.**

Every person, acting with the mental state required for the commission of an offense who directly commits the offense, who solicits, requests, commands, encourages, or intentionally aids another person to engage in conduct which constitutes an offense shall be criminally liable as a party for such conduct.

76-6-301. **Robbery.**

(1) A person commits robbery if:

(a) the person unlawfully and intentionally takes or attempts to take personal property in the possession of another from his person, or immediate presence, against his will, by means of force or fear; or

(b) the person intentionally or knowingly uses force or fear of immediate force against another in the course of committing a theft.

(2) An act shall be considered "in the course of committing a theft" if it occurs in an attempt to commit theft, commission of theft, or in the immediate flight after the attempt or commission.

(3) Robbery is a felony of the second degree.

76-6-302. **Aggravated robbery.**

(1) A person commits aggravated robbery if in the course of committing robbery, he:

(a) uses or threatens to use a dangerous weapon as defined in Section 76-1-601;

(b) causes serious bodily injury upon another; or

(c) takes an operable motor vehicle.

(2) Aggravated robbery is a first degree felony.

(3) For the purposes of this part, an act shall be considered to be "in the course of committing a robbery" if it occurs in an attempt to commit, during the commission of, or in the immediate flight after the attempt or commission of a robbery.

78>-<2>-<2. **Supreme Court jurisdiction.**

(1) The Supreme Court has original jurisdiction to answer questions of state law certified by a court of the United States.

(2) The Supreme Court has original jurisdiction to issue all extraordinary writs and authority to issue all writs and process necessary to carry into effect its orders, judgments, and decrees or in aid of its jurisdiction.

(3) The Supreme Court has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) a judgment of the Court of Appeals;

(b) cases certified to the Supreme Court by the Court of Appeals prior to final judgment by the Court of Appeals;

(c) discipline of lawyers;

(d) final orders of the Judicial Conduct Commission;

(e) final orders and decrees in formal adjudicative proceedings originating with:

(i) the Public Service Commission;

(ii) the State Tax Commission;

(iii) the School and Institutional Trust Lands Board of Trustees;

(iv) the Board of Oil, Gas, and Mining;

(v) the state engineer; or

(vi) the executive director of the Department of Natural Resources reviewing actions of the Division of Forestry, Fire and State Lands;

(f) final orders and decrees of the district court review of informal adjudicative proceedings of agencies under Subsection (3)(e);

(g) a final judgment or decree of any court of record holding a statute of the United States or this state unconstitutional on its face under the Constitution of the United States or the Utah Constitution;

(h) interlocutory appeals from any court of record involving a charge of a first degree or capital felony;

(i) appeals from the district court involving a conviction or charge of a first degree felony or capital felony;

(j) orders, judgments, and decrees of any court of record over which the Court of Appeals does not have original appellate jurisdiction; and

(k) appeals from the district court of orders, judgments, or decrees ruling on legislative subpoenas.

(4) The Supreme Court may transfer to the Court of Appeals any of the

matters over which the Supreme Court has original appellate jurisdiction, except:

(a) capital felony convictions or an appeal of an interlocutory order of a court of record involving a charge of a capital felony;

(b) election and voting contests;

(c) reapportionment of election districts;

(d) retention or removal of public officers;

(e) matters involving legislative subpoenas; and

(f) those matters described in Subsections (3)(a) through (d).

(5) The Supreme Court has sole discretion in granting or denying a petition for writ of certiorari for the review of a Court of Appeals adjudication, but the Supreme Court shall review those cases certified to it by the Court of Appeals under Subsection (3)(b).

(6) The Supreme Court shall comply with the requirements of Title 63, Chapter 46b, Administrative Procedures Act, in its review of agency adjudicative proceedings.

[Previous Document in Book] [Next Document in Book]

ADDENDUM III

NOTICE OF APPEAL

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IN THE THIRD JUDICIAL DISTRICT COURT, SALT LAKE DEPARTMENT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

STATE OF UTAH, Plaintiff/Respondent, vs. KONAI BLOOMFIELD, Defendant/Appellant.	**NOTICE OF APPEAL** Case No. 001904749 FS Judge Roger A. Livingston

Notice is hereby given that Konai Bloomfield, Defendant/Appellant in this matter, hereby appeals to the Supreme Court of the State of Utah from the judgment and conviction entered against him on August 14, 2000, and from the sentence imposed by the Honorable Roger A. Livingston on March 15, 2002.

RESPECTFULLY SUBMITTED this 19 day of March, 2002.

RONALD J. YENGICH

VANESSA M. RAMOS-SMITH

CERTIFICATE OF SERVICE

I hereby declare that I mailed a true and correct copy of the foregoing Notice of Appeal, postage prepaid, this 19 day of March, 2002, to the following:

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